

2001

Andy Gomez v. State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANDY GOMEZ,

Plaintiff/Appellant,

vs.

STATE OF UTAH,

Defendant/Appellee.

Appellate Court No.: 20010742

Priority No.: 3

**APPEAL FROM DENIAL OF PETITION FOR POST-CONVICTION RELIEF
SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR SAN JUAN COUNTY
HONORABLE LYLE R. ANDERSON, DISTRICT COURT JUDGE**

APPELLANT'S OPENING BRIEF

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FILED
UTAH SUPREME COURT

MAR 13 2002

**PAT BARTHOLOMEW
CLERK OF THE COURT**

FILED
Utah Court of Appeals

FEB 15 2002

**Paulette Stagg
Clerk of the Court**

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUE AND STANDARD OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, CODES AND RULES	2
A. Constitutional Provisions	2
B. Statutory Provisions	2
C. Codes and Rules	2
STATEMENT OF CASE	2
A. Nature of the Case	2
B. Course of Proceeding Below	2
C. Disposition in the Court Below	3
D. Relevant Facts	3
SUMMARY OF ARGUMENT	5
ARGUMENT:	6
Point I: Gomez was Constitutionally Entitled to Effective Assistance of Counsel	6
Point II: The Trial Court Lacked Authority To Remove Swenson	9
Point III: The Interference With The Attorney-Client Relationship by the Prosecuting Attorney and the Trial Court Constituted Impermissible Conflicts of Interest	13
Point IV: Huntsman Provided Ineffective Assistance of Counsel	17
CONCLUSION	19
CERTIFICATE OF MAILING	19

ADDENDUM 20

 A. Trial Court’s Orders 21

 B. Constitutional Provisions 30

 B. Statutory provisions 32

 C. Codes and Rules 35

TABLE OF AUTHORITIES

	<u>Page</u>
<u>A. Federal Cases</u>	
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963)	6
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	18
<u>Wheat v. United States</u> , 486 U.S. 153 (1988)	9
<u>B. State Cases</u>	
<u>Ellis v. Gilbert</u> 429 P.2d 39 (Utah 1967)	13
<u>English v. State</u> , 8 MD App 330, 259 A.2d 822 (1969)	12
<u>In the Matter of the Welfare of M.R.S.</u> , 400 N.W.2d 147 (Minn. Ct. App. 1987)	12
<u>Parsons v. Barners</u> , 871 P.2d 516 (Utah 1994)	18
<u>People v. Cravat</u> , 65 Cal.2d 199, 53 Cal. Rpt, 284, 417 P.2d 868 (1966)	10
<u>People v. Dufee</u> , 215 Mich. App. 677, 547 N.W.2d 344 (1996)	12
<u>Rudoph v. Galteka</u> , 2002 UT 7 (January 18, 2002)	1-2
<u>Seel v. Van Der Veur</u> , 971 P.2d 924 (Utah 1998)	1
<u>Smith v. Superior Court v. Los Angeles</u> , 68 Cal.2d 547, 68 Cal. Rptr. 1, 440 P. 2d 65 (1968)	9-12

State v. Barlow,
771 P.2d 662 (Ut. Ct. App. 1989) 9

State v. Hamilton,
732 P.2d 505 (Utah 1986) 9

State v. Johnson,
823 P.2d 484 (Ut. Ct. App. 1991) 19

State v. Velarde,
806 P.2d 1190 (Ut. Ct. App. 1991) 19

State v. Vessey,
967 P.2d 960 (Ut. Ct. App. 1988) 9

Stearnes v. Clinton,
780 S.W.2d 216 (Tex. Crim App. 1989) 9-13

C. Constitutional Provisions

Utah Constitution
Art. I, § 12 2, 5, 6, 8, 19

United States Constitution
Sixth Amendment 2, 6, 8, 19

D. Statutory Authority

Utah Code § 77-32-301 2, 7, 8, 10, 20

Utah Code § 77-32-304 2, 7-11, 20-21

Utah Code § 77-32-306 2, 7

Utah Code § 78-2a-3 1

E. Rules and Code

Utah Rules of Appellate Procedure
Rule 3 1

Utah Rules of Appellate Procedure
Rule 4 1

Utah Rules of Professional Conduct
Rule 1.7 2, 14,17, 23

Utah Rules of Professional Conduct
Rule 1.8 2, 10-11, 24

Utah Rules of Professional Conduct
Rule 3.8 2, 12, 25

Code of Judicial Conduct
Canon 2 2, 16, 22

Code of Judicial Conduct
Canon 3 2, 16, 22-23

IN THE UTAH COURT OF APPEALS

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vs.

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Defendant/Appellee.

Appellate Court No.: 20010742

Priority No.: 3

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure because the entry of judgment on September 4, 2001 is considered to be the final decision of the trial court. *See also*, Utah Code §78-2a-3(2)(e).

The Notice of Appeal was filed on September 13, 2001, within thirty (30) days of the entry of judgment. Thus, pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure, this appeal is timely.

STATEMENT OF ISSUE AND STANDARD OF REVIEW

The issue presented for review is whether the trial court erred in dismissing the petition for post-conviction relief. [R. 1].

The issue presented is a mixed question of law and fact. Findings of fact are reviewed for clear error and conclusions of law are reviewed for correctness. Seel v. Van Der Veur, 971 P.2d 924, 926 (Utah 1998); Rudolph v. Galteka, 2002 UT 7 (January 18, 2002).

CONSTITUTIONAL PROVISIONS, STATUTES, CODES AND RULES

A. Constitutional provisions

Sixth Amendment, United States Constitution
Article 1, Section 12, Utah State Constitution

B. Statutory provisions

Utah Code § 77-32-301
Utah Code § 77-32-304
Utah Code § 78-35a-104
Utah Code § 78-35a-106

C. Codes and Rules

Code of Judicial Conduct, Canon 2
Code of Judicial Conduct, Canon 3
Utah Rules of Professional Conduct, Rule 1.7
Utah Rules of Professional Conduct, Rule 1.8
Utah Rules of Professional Conduct, Rule 3.8

STATEMENT OF THE CASE

A. Nature of the Case

Mr. Gomez appeals from the trial court order dismissing his petition for post-conviction relief.

B. Course of Proceedings Below

1. On March 12, 2001, Mr. Gomez filed a petition for post-conviction relief [R. 1.]
2. On March 26, 2001, the district court entered an order partially dismissing the petition as frivolous. [R. 98].
3. On May 1, 2002, the State of Utah filed a Motion to Dismiss. [R. 104]

4. On May 29, 2001, Mr. Gomez filed a Reply. [R. 107].

C. Disposition in the Court Below

On September 4, 2001, the trial court entered an order dismissing Mr. Gomez' petition for post-conviction relief. [R. 177].

D. Relevant Facts

On October 21, 1991, Mr. Gomez (hereinafter "Gomez") was charged with Aggravated Murder, a Capital Offense and Theft by Receiving Stolen Property, a Third Degree Felony.¹ [R. 32; Exhibit "E" ¶2]. At the time of his arrest, San Juan County did not have a public defender office nor had the County hired a contract attorney to handle indigent cases. [R. 32; Exhibit "E" ¶42]. The County had entered into an informal arrangement with a Price attorney, Keith Chiara (hereinafter "Chiara") to represent indigent defendants. [R. 32: Exhibit "E," ¶ 4]. Chiara, however, had been appointed to represent Gomez' co-defendant, Scott Heird. [R. 32: Exhibit "E," ¶ 3]. In cases where there were two or more defendants, the practice was to assign the case to a local attorney. [R 32: Exhibit "E" ¶4]. Consistent with that practice, a local attorney, Eric Swenson (hereinafter "Swenson") was appointed by the trial court on October 24, 1991. [R 32: Exhibit "A" and Exhibit "E" ¶2].

After being appointed to the case, Swenson met with Gomez and began an aggressive defense, including filing pretrial motions. [R 32: Exhibit "E," ¶ 6]. Swenson then

¹Gomez' companion, Jeffrey Scott Heird, was charged as a co-defendant with the same crimes. [R. 32; Exhibit E, ¶3].

received a letter, dated November 20, 1991, from San Juan County Commissioner Ty Lewis. [R 32: Exhibit “F”]. In that letter, there was a reference to an *ex parte* discussion with the Honorable Boyd Bunnell, District Court Judge, about the Commission’s ‘right’ to review and appoint attorneys for Gomez and Heird so that they could “protect the interests of the County’s taxpayers in this situation.” Id.

On October 29, 1991, the San Juan County Attorney, Craig C. Halls (hereinafter “the San Juan County Attorney”) sent out invitations to an unknown number of local and out-of-area attorneys to submit a bid:

Briefly stated the pending charges involve the murder of George E. Bonds, who was abducted from a Shell Station in Coretz, Colorado during the commission of a burglary or theft. Mr. Bonds was kidnaped, taken to Utah where he was beaten by one or more of the individuals by the use of fists and feet. We believe that Mr. Gomez with the assistance of Mr. Heird then took a piece of tubing and tried to strangle the victim. After this occurred, a whiskey bottle was busted and there was an attempt to cut the throat of the victim. The death occurred when a jeep wagoneer driven by Mr. Gomez then backed over the victim. The vehicle was then pulled forward and once again back over the victim. Both of these individuals have criminal records which include prior felonies . . . Based upon this brief information, we would invite you to submit bids.

[R 32: Exhibit “B”]. Aside from failing to indicate that the ‘facts’ set forth in the letter were the State’s theories, the State failed to mention several significant matters. There was absolutely no mention that Heird was driving the vehicle at the time he was initially stopped. [R 32: Exhibit “C”]. Likewise, there was no mention that the basis of the stop was the suspicion that Heird was driving under the influence. Id. Nor was there mention

of the fact that Heird fled from the stop and was not arrested until he was found during a manhunt the following day. Id. No mention was made that Heird made incriminating statements during the booking process, implicating himself as the sole actor in the murder. [R 32: Exhibit “D”].

The San Juan County Commissions’ assistant sent a letter, dated November 26, 1991, to the Honorable Bruce K. Halliday, District Court Judge, requesting that Swenson be replaced by the Commission’s choice of attorneys for Gomez, Attorney R. Clayton Huntsman (hereinafter “Huntsman”). [R 32: Exhibit “G”].

On December 2, 1991, Huntsman filed an appearance and request for substitution. [R 32: Exhibit “F”]. That same day, Gomez’ Affidavit opposing the substitution was filed. [R 32: Exhibit “H”]. On December 3, 1991, the motion for substitution of counsel was granted. [R 32: Exhibit “I”].

After Huntsman began representing Gomez, he presented Gomez with a plea bargain. During that discussion, Huntsman promised Gomez that he would only do seven (7) years if he pled guilty to the first degree murder charge. [R 32: Exhibits “E,” ¶7(c), “J,” “K.”] Gomez agreed based on the representation that he would do only seven (7) years. [R 32: Exhibit “K”].

SUMMARY OF ARGUMENT

The removal of Swenson after the formation of the attorney-client relationship violated Gomez’ constitutional right to effective assistance of counsel. Both the San Juan County Attorney and the trial court interfered with Gomez’ attorney-client

relationship with Swenson. Both the San Juan County Attorney and the trial court had conflicts of interest. The San Juan County Attorney's role in the removal of Swenson and appointment of Huntsman, deprived Gomez of his constitutional right to counsel. The trial court's *ex parte* contact with the San Juan County Commissioner and removal of Swenson, likewise, deprived Gomez' constitutional right to counsel.

Huntsman's participation in representing Gomez was also a conflict of interest. He knew that Gomez objected to his appointment and that Gomez was represented by Swenson. In addition, given the circumstances of his appointment, Huntsman knew that his appointment was under the goodwill of the San Juan County Attorney, the San Juan County Commission and the District Court Judge. If he ran afoul of that goodwill, Huntsman faced being summarily removed from the case. His loyalty was thus divided. The conflict was further exacerbated when Huntsman promised Gomez that he would only serve seven (7) years in the Utah State Prison if he pled guilty as charged.

ARGUMENT

Point I: Gomez was Constitutionally Entitled to Effective Assistance of Counsel.

The Sixth Amendment of the United States Constitution and Article 1, §12 of the Utah State Constitution provides that in a criminal prosecution, the accused is entitled to counsel. This right is extended to persons who are indigent. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The obligations and standards in providing a defense for indigent defendants are

codified in Utah Code §77-32-301 *et. seq.* That statute, in relevant part, provides as follows:

Each county, city and town shall provide for the defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with the following minimum standards:

- (1) provide counsel for each indigent who faces the substantial probability of the deprivation of the indigent's liberty . . .
- (4) assure undivided loyalty of defense counsel to the client.

The issue of the assigned attorneys' compensation is addressed by Utah Code

§77-32-304(3)(a):

- (1) When representing an indigent, the assigned counsel shall:
 - (a) counsel and defend the indigent at every stage of the proceeding following assignment . . .
- (3) An assigned counsel for an indigent shall be entitled to compensation upon:
 - (a) approval of the district court where the original trial was held.

The basis for appointing an attorney is set forth in Utah Code §77-32-306:

The county or municipal legislative body shall either:

- (1) contract to provide the services prescribed by this chapter through nonprofit legal aid, other associations, or attorneys; or
- (2) authorize the court to provide the services prescribed by this chapter by assigning a qualified attorney in each case.

Consistent with the foregoing constitutional and statutory obligations, the trial court determined that Gomez was indigent and that he faced the loss of his liberty. Under the

authority from San Juan County, the trial court assigned a qualified attorney, Swenson. That appointment was neither conditional nor temporary.

Pursuant to the statutory and ethical obligations, Swenson began representing Gomez. At no time did Swenson suffer a physical incapacity nor was an allegation made that he was incapacitated. Neither he nor Gomez requested that his appointment be rescinded and new counsel be appointed.

The San Juan County Commission approached the trial court, *ex parte*, about Swenson's representation of Gomez. Ostensibly, the reason was that the Commissioners' concern about the cost. After that meeting, the San Juan County Attorney sent out an 'invitation' to bid to a select number of attorneys.

After the Commission selected an attorney, a letter was sent to Swenson telling him that he was not selected as Gomez' defense counsel. A letter was also sent to the trial court asking that the substitution be ordered. At a hearing on that motion, where both Gomez and Swenson objected, the trial court ordered that Huntsman replace Swenson.

Not only did the County violate its obligation to "assure undivided loyalty of defense counsel to the client as set forth in Utah Code §77-32-301(4), but it acted without any authority to question the trial court's appointment.

The trial court lacked the authority to relieve Swenson especially when there were no circumstances that would justify such action. The San Juan County Attorney's role as the attorney for the San Juan County Commission conflicted with his role as the prosecuting attorney. The invitation to bid was riddled with problems. All of these actions

unjustifiably interfered with the attorney-client relationship between Swenson and Gomez. Finally, substitute counsel's actions constituted a conflict of interest and he was ineffective. Based on these errors, Gomez' conviction should be reversed.

Point II: The Trial Court Lacked the Authority to Remove Swenson

It is well established that a trial court has broad discretion with respect to circumstances which ultimately impact a defendant's constitutional right to counsel. For instance, a court can deny a continuance even if it means that a person must be represented by different counsel because his counsel of choice is unavailable. *Wheat v. United States*, 486 U.S. 153, 163 (1988); *See also, State v. Vessey*, 967 P.2d 960 (Ut. Ct. App. 1988)(same). A trial court also has the authority to refuse appointment of a lay person or an unlicensed attorney. *State v. Barlow*, 771 P.2d 662 (Ut. Ct. App. 1989); *State v. Hamilton*, 732 P.2d 505 (Utah 1986). Within the context of assuring that the accused has a fair trial, other courts have held that a trial court may exercise its inherent powers to address situations where counsel has a physical or mental incapacity:

All will agree that if the defendant's attorney exhibits objective evidence of physical incapacity to proceed with a meaningful defense of his clients, such as illness, intoxication, or a nervous breakdown [citations omitted in original], the court need not sit idly by; it should inquire into the matter on its own motion, and if necessary relieve the affected counsel and order a substitution. Yet even that action should be taken with great circumspection and only after all reasonable alternatives, such as granting of a continuance, have been exhausted. Failure to observe these standards, although in a case of undisputed physical incapacity of counsel, will compel a reversal of the ensuing

judgment; and this will follow regardless of whether the defendant's substituted counsel was competent or whether the defendant received a 'fair trial' with respect to the guilt-determining process. (*People v. Cravat* [1966] 65 Cal.2d 199, 53 Cal. Rpt. 284, 417 P.2d 868.)

Stearnes v. Clinton, 780 S.W.2d 216, 220 (Tex. Crim. App. 1989), quoting *Smith v. Superior Court of Los Angeles County*, 68 Cal.2d 547, 68 Cal. Rptr. 1, 440 P.2d 65 (1968).

Here, there was no objective evidence that Swenson was physically incapacitated. The decision to remove Swenson and order substitute counsel was not taken with circumspection or after all reasonable alternatives had been exhausted. The sole reason set forth was that the prosecutor, who also represented the entity which was statutorily responsible for paying for Gomez' defense, wanted Swenson removed.

The County's fiscal concerns do not rise to the level of a constitutionally protected interest. Not only was this concern irrelevant, but the County wholly ignored its statutory obligation to "assure undivided loyalty of defense counsel to the client" as set forth in Utah Code §77-32-301(4).

Even assuming that the basis for the removal was fiscal concerns and that such a concern was legitimate, the trial court's actions were still unjustified. The trial court, for instance, never even inquired as to the fees the Swenson charged, whether Swenson's rate was negotiable or any other alternative. Under the circumstances, the trial court simply allowed the decision to be dictated by the San Juan County Commission and prosecutor.

There is no question but that an attorney-client relationship is independent of the source of compensation. The attorney's responsibilities clearly lie to the client, not to the

person or entity that pays for the legal services:

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:. . .
- (2) There is not interference with the lawyers independence of professional judgment or within the client-lawyer relationship.

Utah Rules of Professional Conduct, Rule 1.8(f)(2).

That compensation must remain separate is illustrated in the following:

[O]nce an attorney is appointed the same attorney-client relationship is established and it should be protected. Any effort to distinguish between the two will be premised upon a fallacy because the attorney's responsibility is to the persons he has undertaken to represent rather than to the individual or agency which pays for the service . . . To hold otherwise would be to subject that relationship to unwarranted and invidious discrimination arising merely for the poverty of the accused.

Stearnes, 780 S.W.2d at 222, *quoting Smith*, 440 P.2d at 74.

Without question, the district court has statutory authority to appoint counsel and to approve the rate of compensation. *See*, Utah Code §77-32-304(3)(a). Yet, here, the district court wholly abandoned its role. No complaints were made by Gomez about Swenson. Both Gomez and Swenson objected to the appointment of substitute counsel. Assuming that the trial court could even consider the fiscal concerns, no bill was ever presented to the trial court by Swenson nor did the trial court ask Swenson about his rates. The trial court simply and without any evidence, acquiesced to the Commission's demand that Swenson be removed. As such, the trial court discriminated against Gomez solely on the basis of his poverty.

This is not to suggest that the trial court would have been bound to pay any bill presented by an appointed attorney. Certainly, the trial court possesses the statutory authority to approve (or not approve) a billing presented by court appointed counsel. The fundamental problem here is the circumstances in which Swenson was removed.

Under the circumstances presented in this case, the removal of Swenson was a direct interference with Gomez' constitutional right to an attorney. That right cannot be interfered with on the basis that the entity statutorily obligated to pay for an indigent person's defense did not want the attorney who was appointed. That right, likewise, cannot be interfered with by the prosecution. *See, In the Matter of the Welfare of M.R.S.*, 400 N.W.2d 147, 153 (Minn. Ct. App. 1987)(Minnesota appellate court reviewed an order dismissing a court-appointed attorney and held an "inviolable attorney-client relationship had been created,' and rejected the argument that since the county was paying for the attorney, the court was entitled to remove that attorney.)

Here, while it is conceded that once an attorney has been appointed, a trial court has the discretion to order a substitution on the request of either the defendant or counsel, it does not necessarily follow that the trial court has a concomitant right to remove counsel on the "payor's" or prosecutor's request. *See generally, People v. Dufee*, 215 Mich. App. 677, 547 N.W.2d 344 (1996)(No authority for trial court to remove attorney who was accused of publicly spreading falsehoods about judge); *English v. State*, 8 MD. App. 330, 259 A.2d 822 (1969)("Once counsel has been chosen, whether by the court or by the

accused, the accused is entitled to *that* counsel at trial”);

The underlying rationale is that investing a Judge with the power to order the outright removal of an attorney “would constitute a severe threat to the independence of the defense bar.” *Stearnes*, *supra*, 788 S.W.2d at 220. Consider again the concern set forth in *Smith* and relied on by *Stearnes*:

If an advocate must labor under threat that, at any moment, if his argument should incur the displeasure or lack of immediate comprehension by the trial judge, he may be summarily relieved as counsel on a subjective charge of incompetency by the very trial judge he is attempting to convince, his advocacy must of necessity be most guarded and lose much of its force and effect.

Stearnes, 780 S.W.2d at 220, *quoting Smith*, 68 Cal.Rptr. at 10, 440 P.2d at 74.

Point III: The Interference With the Attorney-Client Relationship by the Prosecuting Attorney and the Trial Court Constituted Impermissible Conflicts of Interest.

In the case at hand, the San Juan County Attorney filed the criminal information against Gomez. He was the one who ultimately prosecuted Gomez. At all times relevant to this case, the San Juan County Attorney also represented the San Juan County Commission. These various roles led to impermissible conflicts of interest.

It is well established that a prosecutor job’s is to ensure that justice is done. *Ellis v. Gilbert*, 429 P.2d 39, 41 (Utah 1967). Indeed, as set forth in the Comment to Rule 3.8, Utah Rules of Professional Conduct, SPECIAL RESPONSIBILITIES OF A PROSECUTOR, a prosecutor is held to a higher standard:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

In addition, the prosecutor is subject to the Rule 1.7, prohibiting conflicts of interest². The Comment to that rule provides, in relevant part, the following:

Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

Here, while acting in the role of the prosecutor, the San Juan County Attorney also represented that interests of the San Juan County Commission, the entity who was statutorily responsible for paying for the services of the court-appointed attorney. It would stand to reason that the Commission would have an interest in not having an

²The rule, in relevant part, provides that:

- (A) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) The lawyer reasonably believed the representation will not adversely affect the relationship with the other client; and
 - (2) Each client consents after consultation.
- (B) A lawyer shall not represent a client if the representation of that client will be materially limited by the lawyers responsibilities to another client or to a third person or by the lawyer's own interest, unless:
 - (1) The lawyer reasonable believes that the representation will not be adversely affected; and
 - (2) Each client consults after consultation.

aggressive attorney. It would, likewise, stand to reason that a prosecutor would not want to have a formidable adversary who puts him to task. Both interests could easily be at odds with a defendant's constitutional and statutory right to have effective representation as well as with the prosecutor's role to ensure that justice is done.

After the appointment of Swenson, the San Juan County Attorney sent out the invitations to bid. This was not pursuant to a court order nor is there any statutory authority allowing the prosecutor (or the Commission's attorney) to do that.

Assuming *arguendo* that the San Juan County Attorney had the authority to send out the invitations, the selection was riddled with problems. The unanswered questions include, for example, how the attorneys that received the 'invitation' were selected, how many 'invitations' were sent out, when the invitations were sent, and the criteria for choosing an attorney. The importance of this cannot be underestimated. Certainly, there is the appearance is that the prosecution chose a select group of attorneys, ones who may very well not have been as competent or as zealous as Swenson.

In addition, that the San Juan County Attorney misstated facts and omitted significant information further complicates matters. For all that was said, it looked as though there was an airtight case against Gomez and his companion. For all anyone knew, Gomez had confessed, if not caught in the act. Thus, even if a number of able attorneys were notified, the presentation made would have not been as 'inviting'.

This is further compounded by the fact that the "invitation to bid" was sent out as a result of an *ex parte* contact with the trial court. Not only did the San Juan County

Attorney run afoul of his statutory and ethical obligations, but the trial court's actions violated the rules of professional conduct and the canons of judicial conduct:

Canon 2 A judge shall avoid impropriety and the appearance of impropriety in all activities.

A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow . . . relationships to influence the judge's judicial conduct or judgement. A judge shall not lend the prestige of the judicial office *to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.*

[Emphasis added].

The court, at a minimum, advanced the financial interest of the San Juan County Commission. Moreover, there is the distinct impression that the San Juan County Commission is in a special position to influence the trial court. Not only was the San Juan County Commission allowed to contact the court in private, but the court without hesitation, did what the Commission and San Juan County Attorney asked of it.

Canon 3. A judge shall perform the duties of the office impartially and diligently.

(2) A judge shall apply the law and maintain professional competence. A judge *shall not be swayed by partisan interest, public clamor or fear of criticism.*

(7) Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceedings.

[Emphasis added.]

Here, the trial court was swayed by a partisan interest: the financial interests of the San Juan County Commission. In addition, the court considered and acted on the information learned in an *ex parte* conversation. That the court would engage in such conduct is not only a violation of the rules but it is in complete disregard of Gomez' constitutional right to counsel.

Finally and perhaps most important, the unconditional appointment of Swenson, an attorney who was proving to be a formidable adversary as well as a zealous advocate, combined with the timing of the decision to have other counsel, added up to little more than a concerted effort to chill the defense.

Point IV. Huntsman Provided Ineffective Assistance of Counsel

Huntsman was well aware of the circumstances that existed when he entered the case. He was aware that Gomez wanted to be represented by Swenson and that the County, San Juan County Attorney and even the trial court did not want Swenson. It is hard to imagine circumstances where a defense attorney could provide a zealous defense for his client. *See*, Rule 1.7(b)³.

At the very least, Huntsman's appointment was done under the goodwill of the county

³Rule 1.7(B) provides:

(B) A lawyer shall not represent a client if the representation *of that client will be materially limited by* the lawyers responsibilities to another client or to a third person or by the lawyer's own interest, unless:

- (1) The lawyer reasonable believes that the representation will not be adversely affected; and
- (2) Each client consults after consultation.

commission, the prosecutor and the trial court. It stands to reason that Huntsman knew, on some level, that if he ran afoul of that goodwill, he was in the same position as Swenson. Such circumstances do not allow for zealous representation. Accordingly, Huntsman faced a conflict of interest rendering his representation ineffective.

Huntsman also promised Gomez that if he pled guilty he would do no more than seven (7) years. Such a promise is outrageous and falls below the objective level of reasonable professional judgment. Had this promise not been made, Gomez would have proceeded to trial. *Strickland v. Washington*, 466 U.S. 668, 667 (1984)(“To prevail [on an ineffective assistance claim], a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel’s performance prejudiced the defendant.”); *Parsons v. Barnes*, 871 P.2d 516 (Utah 1994)(“[C]ounsel’s deficient performance must have ‘affected the outcome of the plea process.’”).

Here, Huntsman represented his client over his client’s objection. Huntsman then persuaded Gomez to pled to a capital offense based on a promise that Huntsman was not entitled to make. This is not only a violation of his ethics, but it is ineffective assistance of counsel.


The right to the effective assistance because its “so basic to a fair trial that [its] infraction can never be treated as harmless. *State v. Johnson*, 823 P2d 484, 488 (Utah Ct. App. 1991); *State v. Velarde*, 806 P.2d 1190, 1192 (Utah Ct. App. 1991). Under the circumstances of this case, Gomez was denied the right to counsel and his conviction

should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the trial court's order dismissing the petition for post-conviction relief.

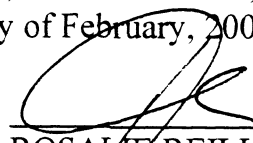
DATED this 14th day of February, 2002.



ROSALIE REILLY
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing to Christopher Ballard, Assistant Attorney General, PO Box 140854, Salt Lake City, Utah 84114-0854, postage prepaid, this 15th day of February, 2002.



ROSALIE REILLY

ADDENDUM

TRIAL COURT'S ORDERS

Handwritten: 9-701

SEVENTH DISTRICT COURT
San Juan County, Utah

FILED SEP - 4 2001

BY _____
CLERK OF THE COURT
DEPT - _____

Handwritten signature

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

ANDY GOMEZ,
Plaintiff,
vs.
STATE OF UTAH,
Defendant

ORDER DISMISSING PETITION

Case No. 0107-25

The court has reviewed the petition for extraordinary relief of Andy C. Gomez ("Gomez"), the motion to dismiss filed by the State of Utah (the "State"), and Gomez' reply. The court now orders the petition dismissed for the following reasons:

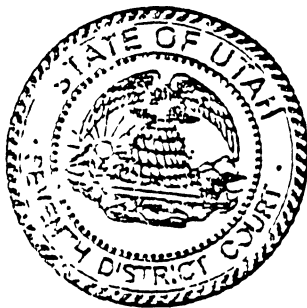
1. Gomez raised the claim that his trial attorney Clayton Huntsman ("Huntsman") had promised him that he would spend only seven years in prison in an earlier petition. When that petition was dismissed, he filed no appeal. That claim has therefore been previously adjudicated and no good cause exists to consider it anew.

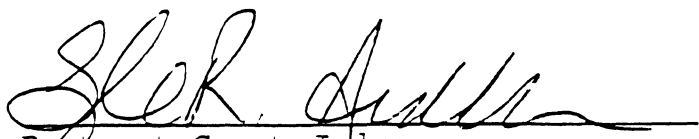
2. Were the court to consider it anew, it would be dismissed because the record is clear that Gomez was advised that the amount of time he would spend in prison was to be decided by the Utah Board of Pardons and Parole. He thus could not have reasonably relied on any estimate by Huntsman. It is clear from the plea

colloquy that whatever Huntsman may have said, Gomez understood before he pled guilty that he could serve up to life in prison and the Utah Board of Pardons and Parole would decide the length of his sentence.

3. Although the court clearly dismissed as frivolous all claims in the petition except the "seven year promise" claim, Gomez persists in asserting that Huntsman had a conflict of interest. That claim was initially inbedded in the claim that the prosecutor had a conflict of interest. In his reply, Gomez separates it out. This is the same claim Gomez' first attorney quixotically pursued after his appointment had been terminated by seeking permission to appeal from the Utah Supreme Court. Gomez clearly abandoned this complaint when he pled guilty, but even if he didn't, it is totally lacking in merit. Swenson's appointment was terminated once San Juan County contracted with Huntsman because San Juan County had the right to contract specifically for the defense of Gomez. It does not follow that San Juan County, having contracted with Huntsman, could abrogate that contract at its whim and require the court to appoint yet another attorney. Huntsman thus was not conflicted by any possibility that San Juan County would abrogate its contract with him.

DATED the 31st day of August, 2001.




District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed or hand delivered true and correct copies of the foregoing ORDER DISMISSING PETITION, postage prepaid, to the following:

Rosalie Reilly
Attorney at Law
P.O. Box 404
Monticello, UT 84535

Christopher D. Ballard
Assistant Attorney General
P.O. Box 140854
Salt Lake City, UT 84114-0180

DATED the 4th day of September, 2001.

Mano Yuhas
Deputy Court Clerk

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

ANDY GOMEZ,
Petitioner,

vs.

STATE OF UTAH
Respondent.

PARTIAL SUMMARY DISMISSAL
AND ORDER DIRECTING SERVICE
OF PETITION

Case No. 0107-25

Petitioner Andy C. Gomez ("Gomez") filed a petition for post-conviction relief on March 12, 2001. Rule 65C (g) (1), U.R.C.P., requires this court to review the petition and dismiss any claims that are frivolous on their face. Rule 65C (h) requires the court to direct the court to serve a copy of the petition on the Attorney General if some part of the petition is not summarily dismissed.

Denial of Counsel

Gomez claims that he was denied his constitutional right to counsel because:

1. San Juan County retained substitute counsel with the court's approval, and the attorney originally assigned was discharged.

2. The prosecutor also represented San Juan County in soliciting bids for attorneys to represent Gomez.

3. The counsel who ultimately represented Gomez was incompetent because he promised Gomez he would only spend seven years in prison.

The counsel originally appointed for Gomez was Eric P. Swenson ("Swenson"). Swenson did not accept his replacement willingly and filed a petition with the Utah Supreme Court asking that he be reinstated as Gomez' lawyer. That petition was not granted. It is obvious that Gomez knew that there was an issue about this because he filed an affidavit expressing his desire that Swenson remain his attorney.

The first two issues raised by Gomez in support of his claim that he was denied his right to counsel are clearly frivolous. Gomez had no right to the appointment of a particular lawyer, and there is nothing constitutionally offensive about permitting San Juan County to advertise for bids from someone willing and able to represent Gomez for a fixed fee.

Similarly, though it may be preferable for counties to exclude the prosecutor from the process of advertising for bids, there is no allegation that Gomez' counsel was ultimately selected by anyone other than San Juan County's governing board, which has that right. The only limitation on the county is that the counsel must be competent. In addition, both of these issues were clearly known to Gomez when he entered his plea. By doing so, he waived these claims.

The allegation that Gomez' counsel promised he would only serve seven years in prison is a different matter. Whether this allegation is true cannot be determined solely on Gomez' word.

There is an interesting contrast between the account of this given by Swenson and that given by another attorney who represented Gomez in another case, William L. Benge. Clayton Huntsman, who ultimately represented Gomez, might offer yet another account. Even though there is a question about whether Gomez could have been deceived about this given the content of his defendant's statement and his colloquy with Judge Bunnell, the court would like a response from respondent before deciding this issue.

The Guilty Plea

Gomez' claims about his guilty plea failing to comply with Rule 11, Utah Rule of Criminal Procedure, are so obviously frivolous that they border on a violation of Rule 11, U.R.C.P. First, counsel for Gomez has obviously failed to read the 1991 version of the Utah Rule of Criminal Procedure. In 1991, Rule 11 included no requirement that defendant be advised of his right to a speedy public trial before an impartial jury, the right to be presumed innocent, or the right to compel the attendance of defense witnesses. It also does not require that he be advised of his right to appeal.

Gomez' counsel has also failed to present, in addition to the colloquy, the defendant's statement that Gomez apparently acknowledged reading and understanding. The law is clear that compliance with Rule 11 can be accomplished at least in part through a defendant's affidavit.

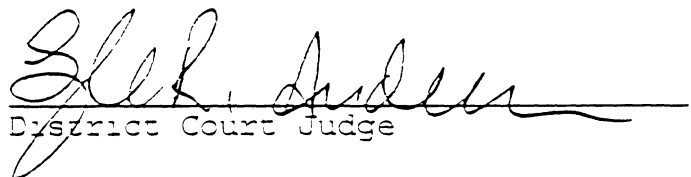
The most glaring omission in Gomez' claim of a Rule 11 violation is the failure to cite Salazar v. Warden, 852 P.2d 988 (Utah 1993), which clearly establishes that a failure to comply

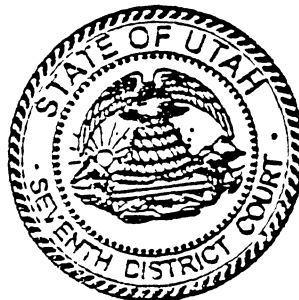
with Rule 11 is not in itself a violation of the Utah or U.S. Constitution. Gomez must not only show that Rule 11 was not complied with; he must show that the guilty plea was in fact involuntary. He has not even attempted this.

Conclusion

The court hereby orders the summary dismissal of all Gomez' claims except the claim that his counsel was incompetent because he promised Gomez that he would spend only seven years in prison. The clerk is directed to serve a copy of the petition on the Utah Attorney General so that a response can be made as provided by law.

DATED the 26th day of March, 2001.


District Court Judge



CERTIFICATE OF MAILING

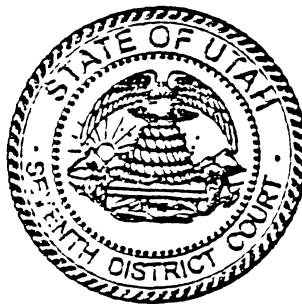
I hereby certify that I mailed true and correct copies of the foregoing PARTIAL SUMMARY DISMISSAL AND ORDER DIRECTING SERVICE OF PETITION, postage prepaid, to the following:

Rose Reilly
Attorney at Law
P.O. Box 404
Monticello, UT 84535

State of Utah
Office of the Utah Attorney General
160 E. 300 S., 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873

DATED the 26th day of March, 2001

Travis E. Goff
Deputy Court Clerk



CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Article 1, Section 12, Utah State Constitution

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgement be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

STATUTORY PROVISIONS

Utah Code § 77-32-301. Minimum standards for defense of an indigent

Each county, city, and town shall provide for the defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with the following minimum standards:

- (1) provide counsel for each indigent who faces the substantial probability of the deprivation of the indigent's liberty;
- (2) afford timely representation by competent legal counsel;
- (3) provide the investigatory resources necessary for a complete defense;
- (4) assure undivided loyalty of defense counsel to the client;
- (5) proceed with a first appeal of right; and
- (6) prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

Utah Code Ann. § 77-32-304 Duties of assigned counsel -- Compensation

- (1) When representing an indigent, the assigned counsel shall:
 1. counsel and defend the indigent at every stage of the proceeding following assignment; and
 2. file any first appeal of right or other remedy before or after conviction that the assigned counsel considers to be in the interest of justice, except for other and subsequent discretionary appeals or discretionary writ proceedings.

- (2) An assigned counsel may not have the duty or power under this section to represent an indigent in any discretionary appeal or action for a discretionary writ, other than in a meaningful first appeal of right to assure the indigent an adequate opportunity to present the indigent's claims fairly in the context of the appellate process of this state.
- (3) An assigned counsel for an indigent shall be entitled to compensation upon:
 - (a) approval of the district court where the original trial was held;
 - (b) a showing that:
 - (i) the indigent has been denied a constitutional right; or
 - (ii) there was newly discovered evidence that would show the indigent's innocence; and
 - (c) that the legal services rendered by counsel were:
 - (i) other than that required under this chapter or under a separate fee arrangement; and
 - (ii) necessary for the indigent and not for the purpose of delaying the judgment of the original trier of fact.

CODES AND RULES

Code of Judicial Conduct, Canon 2

A judge shall avoid impropriety and the appearance of impropriety in all activities.

- A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.
- B. A judge shall not allow family, social or other relationships to influence the judge's judicial conduct or judgement. A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.
- C. A judge shall not belong to any organization, other than a religious organization, which practices invidious discrimination on the basis of race, sex, religion or national origin.

Code of Judicial Conduct, Canon 3 (B)(2)(7)

A judge shall perform the duties of the office impartially and diligently.

- B. Adjudicative Responsibilities
 - (2) A judge shall apply the law and maintain professional competence. A judge shall not be swayed by partisan interest, public clamor or fear of criticism.
 - (7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending

proceedings. A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. No communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with the consent of the parties either in writing or on the record, confer separately with the parties and their lawyers in effort to mediate or settle matters pending before the judge.

Utah Rules of Professional Conduct, Rule 1.7

Conflict of Interest: general rule.

- (A) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) The lawyer reasonably believed the representation will not adversely affect the relationship with the other client; and
 - (2) Each client consents after consultation.
- (B) A lawyer shall not represent a client if the representation of that client will be materially limited by the lawyers responsibilities to another client or to a third person or by the lawyer's own interest, unless:
 - (1) The lawyer reasonably believes that the representation will not be adversely affected and;
 - (2) Each client consults after consultation

Utah Rules of Professional Conduct, Rule 1.8(f)(2).

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (2) There is not interference with the lawyers independence of professional judgment or within the client-lawyer relationship.

Utah Rules of Professional Conduct, Rule 3.8

SPECIAL RESPONSIBILITIES OF A PROSECUTOR

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.